

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings
July 31, 2023
Part of
Public Record

DOCKET NO. NOR 42175

COMPLAINT AND PETITION OF
THE NATIONAL RAILROAD PASSENGER CORP.
UNDER 49 U.S.C. § 24308(f)–FOR SUBSTANDARD PERFORMANCE OF
AMTRAK’S SUNSET LIMITED TRAINS 1 AND 2

BNSF’S REPLY TO AMTRAK’S MOTION FOR PROTECTIVE ORDER

On July 18, 2023, the National Railroad Passenger Corp. (“Amtrak”) filed a Motion for Protective Order in response to the Surface Transportation Board’s (“Board”) July 11, 2023 decision instituting an investigation into the substandard on-time performance of the Sunset Limited, Amtrak Trains 1 and 2. BNSF Railway Company (“BNSF”) hereby replies to the Motion, requesting deletion of one sentence in Section 2 of the proposed protective order, but otherwise agreeing to the proposed protective order.

Consistent with the Amtrak-proposed language in Section 2, BNSF agrees with Amtrak that the parties should limit the designation of materials as “confidential” to the extent possible, and that the parties should have a mechanism to challenge any confidentiality designations with the Board. However, BNSF believes that the specific examples set forth in the following sentence in Section 2 are overbroad and open to different interpretations, which could unnecessarily and prematurely result in disputes between the parties:

For example, data underlying publicly available reporting on metrics codified at 49 C.F.R. § 273.5, and documents reflecting information that is observable from public rights of way, do not require “CONFIDENTIAL” designations.

The Board has typically permitted parties to designate certain information that could fall within these categories as “confidential” in STB proceedings.¹

Counsel for BNSF reached out to counsel for Amtrak prior to filing this reply, seeking Amtrak’s consent to the modification of the proposed order requested here. The undersigned counsel for BNSF is authorized to represent that Amtrak does not oppose striking this sentence from the proposed protective order, so long as this modification does not prejudice Amtrak’s right to challenge the designation of any items that fall into the enumerated categories, and so long as Amtrak is permitted to bring such challenges to the Board if the parties cannot resolve them amicably.

Consistent with Amtrak’s position, the remainder of Section 2 provides a mechanism for challenging any “confidential” designations. This process will permit parties to discuss the potential redesignation of materials at the appropriate juncture, such as after the parties have submitted and reviewed materials, instead of attempting to identify in advance certain discrete classes of information that “do not require” a “confidential” designation. For the foregoing reasons, BNSF

¹ See, e.g., *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 3 (STB served Apr. 2, 2021) (“Confidential Information” includes “traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost workpapers)”); *Appl. of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat’l Ry.*, FD 35743, PDF pg. 4 (STB served Dec. 16, 2013) (“Confidential information” includes “confidential freight traffic data”).

respectfully requests that the Board strike the language in Section 2 of Amtrak's Motion for Protective Order as discussed above, but otherwise grant the Amtrak Motion.

Respectfully submitted,

/s/ Peter W. Denton

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Dated: July 31, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of July, 2023, I have caused the foregoing submission from BNSF to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company